

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BIANCA FAUST, individually and as guardian,
of GARY C. FAUST, a minor, and BIANCA
CELESTINE MELE, BRYAN MELE,
BEVERLY MELE, and ALBERT MELE,

Petitioners,

v.

MARK ALBERTSON, as Personal,
Administrator for the Estate of HAWKEYE
KINKAID, deceased,

Defendant,

BELLINGHAM LODGE #493, LOYAL
ORDER OF MOOSE, INC., ALEXIS
CHAPMAN,

Respondents,

MOOSE INTERNATIONAL, INC., JOHN
DOES (1-10) (fictitious names of unknown
individuals and/or entities) and ABC
CORPORATIONS (1-10) (fictitious names of
unknown individuals and/or entities),

Defendants.

No. 81356-6

En Banc

Filed July 16, 2009

OWENS, J. -- Commercial sellers of alcoholic beverages may be liable for damages to a third party suffered at the hands of a drunk driver on a theory of negligent overservice of a person apparently under the influence of alcohol. This case calls for examination and clarification of the evidence necessary to properly establish a triable issue of fact regarding negligent overservice under RCW 66.44.200(1).

Facts

Hawkeye Kinkaid died the night his car struck the car driven by Bianca Faust. Prior to the accident, Kinkaid spent most of the afternoon with his girlfriend, Alexis Chapman, and went with her to the Bellingham Moose Lodge at 4:30 p.m. Shortly after Kinkaid left the lodge, he drove his car across the center line of La Bounty Road where it struck Faust's vehicle. The force of the collision injured Faust and her passengers and rendered one passenger paraplegic.

While at the lodge, Kinkaid was served alcohol by Chapman. Evidence submitted at trial indicated that Kinkaid had not been drinking before his arrival at the lodge. According to statements by Chapman to others, prior to the accident Kinkaid had been drinking for a prolonged period of time, had become belligerent and argumentative with her, and had become too "tipsy" to be driving. 2 Verbatim Report of Proceedings (VRP) at 265. In addition, Chapman later told a friend of Kinkaid's that he was so drunk that night that she had to cut him off.

Kinkaid was intoxicated at the time of the accident. A toxicology report showed that Kinkaid's blood alcohol content (BAC) was .14 one hour after the accident. Tests performed during Kinkaid's autopsy revealed a BAC of .09, still above the legal limit after loss of blood and replacement of some fluids. Kinkaid's stomach contained undigested alcohol. According to Faust's forensic consultant, Kinkaid had likely imbibed 21 12-ounce beers or 30 ounces of 80-proof alcohol and probably achieved what he estimated was a .32 BAC at the time of the collision.

Faust sued Kinkaid's estate, the lodge, and Chapman, claiming negligence on a variety of theories. The jury found for Faust, and the trial court entered a judgment of \$14 million. The trial court denied several posttrial motions brought by the defendants, including a motion for judgment as a matter of law. The lodge and Chapman appealed and Faust cross-appealed. The Court of Appeals reversed and vacated the judgment against the lodge and Chapman and denied Faust's cross-appeal. *Faust v. Albertson*, 143 Wn. App. 272, 276, 178 P.3d 358 (2008). Faust petitioned for this court's review, and we granted review to consider a potential conflict between the Court of Appeals decision and our prior cases involving the standard of civil liability for alcohol overservice. *Faust v. Albertson*, 164 Wn.2d 1025, 196 P.3d 136 (2008).

Analysis

A. *Standard and Scope of Review*

This court accepted review to resolve two questions. First, under RCW 66.44.200(1), must a plaintiff produce direct, point-in-time evidence that the tortfeasor was “apparently under the influence of liquor” when he was last served? Second, did the Court of Appeals err when it found no competent evidence creating an issue of material fact and reversed the trial court’s denial of a defense motion for judgment as a matter of law?

Faust challenges as error the Court of Appeals’ reversal of the trial court’s denial of judgment as a matter of law. Judgment as a matter of law under CR 50 is appropriate only when no competent and substantial evidence exists to support a verdict. *Delgado Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). In reviewing a ruling on a motion for a judgment as a matter of law, we engage in the same inquiry as the trial court. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). One who challenges a judgment as a matter of law “admits the truth of the opponent's evidence and all inferences which can reasonably be drawn [from it].” *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963). We interpret the evidence “against the [original] moving party and in a light most favorable to the opponent.” *Id.* A judgment as a matter of law requires the court to

conclude, “as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.” *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). However, the court “must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). “Overturning a jury verdict is appropriate only when [the verdict] is clearly unsupported by substantial evidence.” *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994).

B. *The Necessary Evidence to Establish a Triable Issue of Fact on Alcohol Overservice*

RCW 66.44.200(1) prohibits the sale of alcohol to “any person apparently under the influence of liquor.” Businesses that violate the statute by serving drunk drivers will be civilly liable to third-party victims for damages caused by their patron. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 262-63, 96 P.3d 386 (2004). In *Barrett*, this court recognized that the older “obviously intoxicated” common law standard¹ had been replaced by “apparently under the influence.” *Id.* at 274-75. Further, this court recognized that the two standards differ meaningfully. *Id.* at 269.

The question presented here boils down to whether the evidentiary burden to

¹ See, e.g., *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 762, 458 P.2d 897 (1969); *Wilson v. Steinbach*, 98 Wn.2d 434, 437-38, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 641, 618 P.2d 96 (1980).

establish a triable issue of fact should be lowered concomitantly with the standard of civil liability. Typically, plaintiffs “may establish any fact by circumstantial evidence.” *Tabak v. State*, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994). Before juries, circumstantial and direct evidence are viewed as equivalently valuable. *See* 6 Washington Supreme Court Committee on Jury Instructions, Washington Practice: Washington Pattern Jury Instructions: Civil § 1.03, at 22 (2005). Nonetheless, the Court of Appeals held that plaintiffs must provide specific point-in-time observational evidence of the tortfeasor’s appearance close to the time of service in order to send the question to the trier of fact. *Faust*, 143 Wn. App. at 281-82. In *Barrett*, we declared that our recognition of the statutory standard for civil liability did not “upset [any] established precedent.” 152 Wn.2d at 274; *see Faust*, 143 Wn. App. at 280 n.3 (“the required evidence does not appear to have changed”). Thus, cases interpreting the evidentiary burden plaintiffs must carry to defeat a defense motion for summary judgment (or judgment as a matter of law) remain good law.² A review of those cases reveals a consistent insistence by this court that evidence on the record must demonstrate that the tortfeasor was “apparently under the influence” by direct, observational evidence at the time of the alleged overservice or by reasonable inference deduced from observation shortly thereafter.

² The analysis under CR 50 is substantially identical to that under CR 56. *See* 4 Karl B. Tegland, Washington Practice: Rules Practice 199, 371-72 (5th ed. 2006).

This court has held that a combination of postaccident observational evidence, expert testimony, and BAC were insufficient evidence to survive a summary judgment motion. *Purchase v. Meyer*, 108 Wn.2d 220, 223, 737 P.2d 661 (1987). *Purchase* involved the alleged overservice of a 19-year-old who, some time after leaving a restaurant where she and her friends had been drinking, struck a motorcyclist with her car. *Id.* at 222. Meyer's BAC was measured at .13 some three and one-half to four hours after she had left the restaurant. *Id.* The court held:

Insofar as a cause of action for furnishing intoxicating liquor to an "obviously intoxicated" person is concerned, the results of a blood alcohol test . . . and an expert's opinion based thereon, and the physical appearance of that person at a substantial time after the intoxicating liquor was served, are not by themselves sufficient to get such a cause of action past a motion for summary judgment. Whether a person is "obviously intoxicated" or not is to be judged by that person's appearance at the time the intoxicating liquor is furnished to the person.

Id. at 223. Because a heavy drinker may not appear intoxicated despite a high BAC and because alcohol may react on the human body differently because of "medically recognized variables," the court restated the rule that sobriety must be judged at the time of service. *Id.* at 225-26. As direct, observational evidence was lacking in the record, the court concluded that the restaurant's motion for summary judgment should have been granted. *Id.* at 227-28.

This court reiterated the proposition that the appearance of intoxication must be judged at the time of service in *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307

(1989). In *Christen*, the court reviewed summary judgment for the defendants when the only evidence on the record was from a waitress who deduced that the tortfeasor must have appeared under the influence based on the amount of alcohol he was served. *Id.* at 489-90. The court agreed that this evidence was insufficient to defeat a motion for summary judgment because no evidence existed on the record as to the tortfeasor's actual appearance. *Id.*

The *Purchase* and *Christen* courts distinguished an earlier case, *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), because postservice observations of the driver's apparent intoxication in *Dickinson* occurred within a short time of leaving a drinking establishment. *Purchase*, 108 Wn.2d at 227-28; *Christen*, 113 Wn.2d at 490-91. In *Dickinson*, a drunk driver traveling the wrong way on a freeway off ramp collided with a motorcyclist and injured its driver. 105 Wn.2d at 459. The driver admitted to drinking consistently at a banquet he had left just five minutes before the accident occurred. *Id.* at 460. The responding officer noted that the driver "was unsteady on his feet, had bloodshot eyes and a flushed face, and smelled of alcohol." *Id.* This court reversed, holding that the officer's testimony, in addition to the driver's admissions constituted sufficient evidence to defeat a defense motion for summary judgment. *Id.* at 464-65. Because the officer's testimony reflected the driver's appearance so soon after leaving the banquet, the court reasoned that the testimony

could provide the basis for a reasonable inference about the driver's appearance when he was served. *Id.* at 464.

Similarly, this court's per curiam opinion in *Fairbanks v. J.B. McLoughlin Co.*, 131 Wn.2d 96, 929 P.2d 433 (1997), reflects that observational evidence by a police officer and the victim of a collision obtained shortly after the alleged overservice can give rise to a material question of fact. *Id.* at 103. Thus, *Fairbanks* and *Dickinson* allow juries to draw inferences from firsthand observations of a person's intoxication and to make any related credibility determinations.

Faust and her amici contend that the plaintiffs' evidentiary burden in negligent overservice cases necessarily must be lower in light of *Barrett*. Washington State Association for Justice Foundation argues that "[s]ubstantial evidence can only be evaluated under CR 50 through the prism of the substantive legal standard that must be met." Br. of Amicus Curiae Wash. State Ass'n for Justice Found. at 19-20. However, our case law already contemplates that because the standard of liability revolves around appearance, any direct or circumstantial evidence must address actual rather than assumed appearance. Under this rule, jurors are not permitted to make an inferential leap of the "driver's BAC was X, so he *must have* appeared drunk" type. We reject this construction for the reasons outlined in *Purchase*. The underlying physiological science reflecting that not all drinkers will appear drunk at certain levels

of alcohol consumption does not seem to have changed and no argument before this court challenges that science.³

We see no reason to doubt the underlying logic and reasoning contained within the *Purchase* decision, and we do not move away from its established rule. Thus, we evaluate the evidence presented below under our existing standards to determine whether judgment as a matter of law was appropriate.

C. The Court of Appeals Erred when it Balanced and Weighed the Evidence on Appeal

Our precedent is clear that jurors are allowed to consider and weigh circumstantial evidence of the appearance of intoxication when the witness's observation occurred within a short period of time after the alleged overservice. *Dickinson*, 105 Wn.2d at 464-66; *Fairbanks*, 131 Wn.2d at 103. Here, the record contains such evidence. That Chapman could recognize that Kinkaid was drunk at the time he left the bar leaves open the possibility that the jury could infer that she could tell he was drunk when she last served him. It was error to take this question away from the jury on appeal.

The facts on the record, when viewed in the light most favorable to Faust, could lead to permissible inferences that Kinkaid was apparently under the influence when

³ Amicus curiae Mothers Against Drunk Driving challenges the evidentiary burden on policy grounds: that lowering the burden would increase civil liability and better address the goal of reducing drunk driving fatalities and injuries. Its argument is better placed before the legislature.

he was last served. Primarily, the jury would be entitled to weigh Chapman's corroborated admission that Kinkaid was too drunk to be driving when he left the lodge. Corroborated admissions of a party may constitute substantial evidence of any fact in issue even if the admissions are later denied. *See Smith v. Leber*, 34 Wn.2d 611, 622, 209 P.2d 297 (1949). Chapman's admissions appeared before the jury by way of Rainy Kinkaid's testimony as well as that of Lisa Johnston. The results of Kinkaid's BAC test along with the findings derived from his autopsy corroborate that Kinkaid was drunk well beyond the legal limit at the time of the accident. Also, Chapman's observations occurred within a window of time that satisfies this court's holdings in *Fairbanks* and *Dickinson*.

As amicus Washington State Association for Justice Foundation points out, this court has not addressed whether BAC can be considered as corroborative evidence of apparent intoxication (nor obvious intoxication under the older, common law standard). RCW 46.61.506(1) provides that BAC is admissible in both criminal and civil cases. While this court has rejected BAC as evidence sufficient *by itself* to establish a triable issue of fact regarding apparent intoxication, *Purchase*, 108 Wn.2d at 223; *Christen*, 113 Wn.2d at 487; *see Estate of Kelly v. Falin*, 127 Wn.2d 31, 37-38, 896 P.2d 1245 (1995), BAC evidence is relevant as corroborative and supportive of the credibility of firsthand observations, *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn.

App. 239, 248-50, 935 P.2d 1377, *review denied*, 133 Wn.2d 1012 (1997).

Moreover, the timing of the accident, when viewed in the light most favorable to the nonmoving party, leads to a triable issue of fact for the jury, as the trial court recognized. The collision occurred at 7:45 p.m. Ex. 10. Faust put forward evidence at trial that Kinkaid left the lodge at approximately 7:30 p.m. 3 VRP at 364; 5 VRP at 669-70; 6 VRP at 908. The defendants put forward evidence that Kinkaid left the lodge earlier and visited a bowling alley in the intervening time period. *See* 11 VRP at 1663-65. Faust's attorney challenged the credibility of the witness on cross-examination. *Id.* at 1677-79. Credibility determinations lie with the jury, and it was entitled to weigh these conflicting statements about timing and Kinkaid's whereabouts on the day of the collision.

Finally, observations by other lodge patrons may support a factual finding that Kinkaid was not apparently under the influence when he was last served, but because those observations were challenged by other observational evidence, as well as impeached as self-interested testimony, the jury was entitled to weigh this evidence against all else presented at trial. Lodge members did testify to Kinkaid's appearance, but Faust alleged a "conspiracy of silence" due to the ties of membership in the fraternal organization and impeached their testimony on the grounds of faulty memory and inconsistent statements. The Court of Appeals improperly weighed one side of

this evidence against the other when it reversed the trial court's denial of the defense motion for judgment as a matter of law.

Conclusion

We hold that evidence sufficient to submit the issue of negligent overservice to a jury may be either direct or circumstantial and that evidence of BAC and autopsy reports can corroborate evidence of postservice appearance and support an inference that a defendant appeared under the influence at the time he was served. Because the jury was entitled to hear and weigh the credibility of evidence pertaining to Kinkaid's appearance at the lodge, the Court of Appeals erred in vacating the verdict. We reverse the Court of Appeals and reinstate the jury verdict.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Barbara A. Madsen

Justice James M. Johnson

Justice Richard B. Sanders

Philip J. Thompson, Justice Pro
Tem.

Justice Tom Chambers
